No. 80-1199

IN THE

Supreme Court of the Uni

OCTOBER TERM, 198

THE AMERICAN TOBACCO C
TOBACCO WORKERS' INTERNATIO
AND LOCAL 182 OF TOBACCO
INTERNATIONAL UNIO

v.

JOHN PATTERSON, MARION
EDMUND PAGE, JAMES RA
AND PERCY TAYLOR

AMERICAN BRANDS, IN

v.

EQUAL EMPLOYMENT OPPORTUNIT

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FOU

BRIEF OF PETITIONERS THE
TOBACCO COMPANY AND
BRANDS, INC.

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a Division of Amer
Inc., and American

Question Prese

Whether the immunity from Title V
fide seniority systems under § 703(h)
tems instituted or revised after the ef

*American Brands, Inc. has no parent, s
to be reported under S. Ct. R. 28.1.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1199

THE AMERICAN TOBACCO COMPANY,
TOBACCO WORKERS' INTERNATIONAL UNION,
AND LOCAL 182 OF TOBACCO WORKERS'
INTERNATIONAL UNION,

Petitioners,

v.

JOHN PATTERSON, MARION MOSHOE,
EDMUND PAGE, JAMES RANDOLPH
AND PERCY TAYLOR,

Respondents.

AMERICAN BRANDS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS THE AMERICAN TOBACCO COMPANY AND AMERICAN BRANDS, INC.

Opinions Below

The *en banc* opinion of the Fourth Circuit as to wh
is here sought appears at 634 F.2d 744 (1980) and is
in the Joint Appendix (JA 135-184). Previous opinio
Fourth Circuit in these cases are reported at 535 F
cert. denied, 429 U.S. 920 (1976) (JA 70-107) ("
I"), and 586 F.2d 300 (1978) (JA 112-134) (*"Patter*
Previous opinions of the district court are unofficially
at 8 Fair Empl. Prac. Cas. 778 (1974) (JA 2-49) (
opinion on liability); 11 Fair Empl. Prac. Cas. 577 (19
50-69) (opinion on relief); and 18 Fair Empl. Prac.
(1977) (JA 109-111) (order denying motion to recon
vacate prior findings of liability).

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1
The judgment of the court of appeals was entered on N
18, 1980. The petition for a writ of certiorari was tin
on January 15, 1981 and was granted on June 15, 198

Statutory Provision Involved

Section 703(h) of Title VII provides (42 U.S.C.
2(h)):

> Notwithstanding any other provision of this sul
> it shall not be an unlawful employment practice fo
> ployer to apply different standards of compensatio
> ferent terms, conditions, or privileges of employm
> suant to a bona fide seniority or merit system, or
> which measures earnings by quantity or quality of
> tion or to employees who work in different locati
> vided that such differences are not the result of an
> to discriminate because of race, color, religion, se
> tional origin, nor shall it be an unlawful employm
> tice for an employer to give and to act upon th
> of any professionally developed ability test provi
> such test, its administration or action upon the

not designed, intended or used to discriminate bec
race, color, religion, sex or national origin. It shall
an unlawful employment practice under this subcha
any employer to differentiate upon the basis of sex
termining the amount of the wages or compensatic
or to be paid to employees of such employer if su
ferentiation is authorized by the provisions of secti
(d) of Title 29.

Statement of the Case

These are employment discrimination cases, consolida
trial, in which the plaintiffs alleged violations of Title
the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*,
separate plants of The American Tobacco Company, a D
of American Brands, Inc. (hereinafter collectively "Amer
located in Richmond, Virginia. One facility, the W
Branch, manufactured cigarettes and the other, the Ric
Branch, manufactured pipe tobacco. Respondents John
son, et al., were plaintiffs in one case, a class action a
race discrimination, and respondent Equal Employment
tunity Commission was plaintiff in the other, alleging bo
and sex discrimination.[1] American was a defendant i
cases, as was the local union (Local 182 of The T
Workers' International Union).[2] The International Uni
a defendant in the *Patterson* case only.

No finding of present intent to discriminate was made
ing the trial in 1974.[3] Evidence showed, and the courts
recognized, that commencing even prior to the enactm

[1]Plaintiffs in the *Patterson* case alleged violations of the Civi
Act of 1866, 42 U.S.C. § 1981, in addition to their Title VII cl

[2]At the direction of the court of appeals in *Patterson I*, Lo
was dismissed in the *EEOC* case.

[3]"Even without specific proof of overt or particular acts of
nation, the statistical evidence is more than sufficient to establish
facie case of discrimination for the two branches" (district court,
"[t]he evidence in this case upon which the district court found
was statistical. That court did not find 'specific proof of overt
ticular acts of discrimination.' The whole case must be read w
background" (Widener, J., dissenting in *Patterson II*, JA 122).

Title VII, steps had been taken to elimina
including the merger of formerly black-white u
ber 1963 (JA 19-20, 75), elimination of
ities and abolishment of departmental senior
32, 75), cessation of discriminatory hiring
and affirmative efforts with regard to hiring (
steps were taken in January 1968[4] when a po
procedure replaced a canvassing procedure f
under the already existing plant-wide seniority
28, 76) and either nine lines of progression
(JA 142-43 & n.4)[5] or numerous lines "were
for the nine lines at issue here" (JA 162; emph

The district court found specifically that th
post-Act discrimination in hiring (JA 9-10). I
American's seniority system was "facially fair
7). Liability was premised on the basis o
of past discrimination which "constitute, in t
continuing violations of Title VII" (*id.*). T
summarized its liability holding in language
much had been done to eliminate discriminati

[4]The charges underlying the *Patterson* case were f
February, 1969, and the charge underlying the *EEO*
April 8, 1969 (JA 6).

[5]Notwithstanding the absence of any specific find
court, the majority below, *sua sponte*, found as a fa
progression first came into existence in 1968 after t
Title VII. This finding was made even though the
to when the lines of progression were first institute
issue at the trial, which occurred years before this
International Brotherhood of Teamsters v. *United St*
(1977) and *California Brewers Ass'n* v. *Bryant*, 44

[6]As this language from the dissenting opinion be
is a genuine factual dispute on the current record as
of progression indeed antedated the effective date
for purposes of this appeal, petitioners are treating t
sion as having come into existence after Title VII's

[7]Following the 1963 and 1968 changes, the vast m
open for bidding by all employees and awarded
bidder, the lines of progression involving only two or
tions each out of the 200-plus job classifications at
son Respondents' Brief in Opposition 27, 30).

present disparities were largely beyond Ame
(JA 8-9):

> The present system of posting and bidd
> 1968 is fair, although it needs, in the Court
> implementation. As indicated in the finding
> ever, black and female employees in the Ric
> and the Virginia Branch have been locked
> a result of prior discriminatory practices. *
> *of the static condition of the tobacco indu*
> *and American in particular, and the advent*
> *both of which have limited opportunities for*
> *ment of present employees and for new hir*
> added.)

The specific employment practices found vio
VII were two portions of American's system hel
the effects of past discrimination in hiring and jo
(1) American's practice of separate seniority at
with loss of accumulated seniority in the event
(2) six lines of progression.[9]

In *Patterson I* the Fourth Circuit affirmed this

---

[8]The district court also found that American's selecti
personnel violated Title VII, a finding which the *en banc*
has now directed be reconsidered (JA 148-154). The
the selection of supervisors are not involved in this ap

[9]The district court found that, of nine job lines of p
lines were justified under the then-applicable business n
three found so justified and not part of this appeal w
helper-prefabrication to adjuster-prefabrication; (2) m
adjuster to overhaul adjuster; and (3) learner adjuster
31-32).

Six remaining job lines of progression, however,
lawful because they "perpetuated past discrimination
sex and race" and did not withstand analysis under th
business necessity test (*id.*). The remaining six were:
making machine operator or Schmermund box operat

(Footnote continued on following page)

recognized the efforts that had been
ination (JA 77):

> Although the company and t
> in recent years to correct som
> past, the lines of progression, t
> job descriptions and barriers
> branches remain impediments tc
> ment practices. Much must still
> taint of racial discrimination at t

With respect to the lines of progress
on the basis that they "perpetuated tl
nation" (JA 79) and did not meet
with its emphasis on safety and no
79-80). This Court denied a petitio
1976.

Thereafter, while these cases were
court for back pay proceedings, this C
in *International Brotherhood of Team*
U.S. 324 (1977) and *United Air L*
U.S. 553 (1977). Petitioners thereup
the prior finding of liability on the
longer stand in light of these decision
relief, but in *Patterson II*, a panel of t
as to the practice of separate senio
manded for a determination whethe
fide" within the meaning of § 703(h).
to include the lines of progression wi
mand.

On rehearing, the court *en banc*, a
for a determination whether the pra

(Footnote continued from previous page)

juster; (5) catcher to examiner-making; (
boxer to examiner packing; (7) boiler ope
assistant adt dryer operator to adt dryer o
tile dryer operator to textile dryer operat

at each plant was "bona fide" (JA 145-
did not similarly remand as to the lines
the issue whether the lines of progressic
tem" and thus entitled to the same bc
§ 703(h) had been briefed and argued b
the court did not decide that question.
the court held that in its view "§ 703(h)
tion to American's job lines of progres
not it be considered a 'seniority syste
operation" (JA 142), and held that "
seniority systems by § 703(h) . . . run[
in existence at the time of Title VII's ef

Summary of Argu

Section 703(h) reflects the balance c
gress between, on the one hand, the na
in Title VII of seeking the elimination
work place and encouraging voluntary
and, on the other hand, the equally imp
of fostering free collective bargaining
concept of seniority. This congressional
systems immunity from Title VII liabili
tent to discriminate. The express lan
unusual history, prior interpretations by
cable policy considerations dictate that
all bona fide seniority systems, post- as v

Congress used unrestricted language
dresses *all* bona fide seniority systems.
cover pre- but not post-Act systems, it
so. The court of appeals, however ignor
§ 703(h) and was heedless of cardinal
interpretation. As a result, it effectively
formed the § 703(h) definitional provis
"grandfather" clause, even though it w
ceive of any more precise language Co
to command coverage of both pre-Act
seniority systems.

The legislative history of §
pretation that all seniority
Act fall outside the ambit of
to "established" and "existin
Justice Department memora
144 & n.5) simply do not jus
thing, those memoranda, whe
for the opposite conclusion.
ments do not address the s
ambiguous terms, they certa
expressed congressional inte
the statute itself.

When confronted with oth
this Court has made it clear
expansive, not restrictive, in
principle that significant fre
and unions in the continuin
to create and change seniori
sociation v. *Bryant*, 444 U.S
lines, Inc. v. *Hardison*, 432 U
Inc. v. *Evans*, 431 U.S. 553
of Teamsters v. *United State*
announced below would ne
analysis of any post-Act seni
statistical disparate impact, r
tent to discriminate. The crit
icy encouraging the give and
thus be substantially impaire
herein by petitioners, which
well as pre-Act bona fide sen
freedom and be in complete
and this Court's teachings tha
be premised on a search for

In addition to the frustrati
labor relations, it also will h
action. Post-Act changes in
under § 703(h), although n

the Act, will be discouraged
changes would take the system
will be out of harmony with Tit
or catalyst to cause 'employers
to self-evaluate their employme
eliminate' " the effects of discri
America v. *Weber*, 443 U.S. 1
marle Paper Co. v. *Moody*, 42

ARGU

The Plain Language O
Post-Act As Well As P

A. The Court of Appeals'

At stake in this case is the v
a provision which on its face
fide seniority . . . system[s]," p
to such systems "are not the re
nate." Notwithstanding such pl
court of appeals, after finding t
established after the Act's effe
nity accorded seniority systems
systems in existence at the tim
(JA 144) and that "interests
provision were only "those se
incumbent workers when Title
note omitted).

In explaining the effect of its
plication to seniority systems i
of Title VII, the majority state
post-Act period must of course

[10] *Griggs* v. *Duke Power Co.*, 40

[disparate impact] a
cially neutral policie
in their consequence

B. THE STATUTOR
RESTRICTIVE I

The narrow inter
§ 703(h) inapplicab
time of Title VII's e
express language of t
longstanding canons

As in any case in
"starting point must
Reiter v. *Sonotone C*
"must, of course, sta
purpose is expressed
used." *Richards* v. *U*
often than not, there
pose of a statute tha
took to give expressi
Trucking Associatio
clearly expressed leg
press] language must
sumer Product Safet
S. Ct. 2051, 2056 (

Section 703(h) pr

> Notwithstand
> not be an unla
> to apply . . .
> employment pu
> . . . provided
> an intention to

The literal langua
dence against the re

its face, this definition
pre- and post-Act bo
meant to cover one bu
so simply by using a
bona fide seniority sy
a course. Rather, Con
fide seniority systems.

Significantly, the se
present and future te
apply" different empl
fide seniority . . . syst
of such language is th
It is intended to appl
systems adopted or re

The court of appeal
equivocation or lack o
Rather, the court devi
transformed the sectio
exempting pre- but no
be difficult to conceiv
could have used to co
Act bona fide seniorit

As the dissenters bel
knows how to write a
case wrote an exceptio
Congress drafted and
of Title VII.[18] Section

[11]In *Franks* v. *Bowma*
Court stated that § 703(
defining what is and wh

[12]*Richards* v. *United S*

[13]For example, § 701(b
ployer" definition of the
253 (1964):

(Footnote continued on fol

any such sa
corded "bor
unmistakabl
semblance t

Congress

(*Footnote cont*

Provid
scribed
than o
sidered
person
agents)
year a
(and t
phasis

Section 701(e
definition for
gress easily co
post-Act senio
ambit of § 703
existence on t
716"; or, "pro
vested on the
716." Howeve

[14]Savings or
by saving accr
2A Sutherland,
clauses invaria
long as that
in the savings
of 1958, 49 U
in interest) [w
route or route
to continue th
In *United Stat*
the Court con
ing Company

Any
in secti
time p
litigatio
1966,
tion of
of the

all bona fide seniority systems be protected. This plain statutory language was simply ignored by the court below. That court was "not at liberty to imply a condition which is opposed to the explicit terms of the statute . . . To [so] hold . . . [was] not to construe the Act but to amend it." *Detroit Trust Co.* v. *The Barlum*, 293 U.S. 21, 38 (1934).[15] "After all, Congress expresses its purpose by words. It is for us to ascertain — neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam* v. *United States*, 340 U.S. 593, 596 (1951).

II.

The Legislative History Supports The Construction That Section 703(h) Protects Post-Act As Well As Pre-Act Seniority Systems

Notwithstanding the unequivocal language of § 703(h) and its dissimilarity to a savings clause, the court of appeals considered its interpretation justified by the "legislative history of § 703(h)" which it variously described as "conclusively demonstrat[ing]," [16] "replete with indications," [17] or at least "suggest[ing]" [18] that post-Act systems were not intended to be encompassed by § 703(h). In the main, the court of appeals relied on isolated references to "established" and "existing" seniority rights in two memoranda, the Clark-Case memorandum and a Justice Department memorandum, inserted in the Congressional Record (JA 144 n.5). Yet, just as the language of § 703(h) evinces no congressional intent to confine the section's application to pre-Act seniority systems, neither does this limited "legislative history" relied on below. To the contrary, that "history" standing alone is at best ambiguous on the issue presented here and falls far short of the showing needed to disregard the words Congress expressly employed.

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[15] *See also Fedorenko* v. *United States*, 49 U.S.L.W. 4120, 4126 (1981); *Diamond* v. *Chakrabarty*, 100 S. Ct. 2204, 2207 (1980).

[16] JA 144.

[17] *Id.*

[18] *Id.* at n.5.

Furthermore, such a tunnel-visioned view of the legislativ history of § 703(h) ignores other facets of the section's history such as the date of the Clark-Case and Justice Departmen memoranda relative to the date § 703(h) was first proposed the limited concern to which those memoranda were respondin and other statements in addition to those focused on by the cour below. Viewed in its totality, the legislative history demon strates that in enacting § 703(h), Congress was concerne with protecting the important concept of seniority in all its nu merous and varied manifestations. Thus, contrary to the con clusion of the court below, the legislative history supports th construction that the section protects *all* bona fide seniorit systems, post- as well as pre-Act.

On several occasions, this Court has reviewed the circum stances preceding the adoption of § 703(h). *See Teamsters,* 431 U.S. at 350-55; *Franks,* 424 U.S. at 758-62 (noting the "unusua legislative history" of the section and "the absence of the usua legislative materials" surrounding its adoption). In so doing the Court has referred to the Clark-Case and Justice Departmen memoranda as "authoritative indicators of [§ 703(h)'s] purpose." *Teamsters,* 431 U.S. at 352. But neither *Teamsters* nor *Frank* expressly considered the issue presented here and in considerin that issue, these "authoritative indicators" must be seen in ful context.

It must be remembered that the memoranda were introduce into the record by Senator Clark on April 8, 1964, during the general debate on the bill passed by the House. They were drafted in response to criticisms of another Senator that the bill, which contained no predecessor to the eventual § 703(h), would, *inter alia,* "undermine the vested rights of seniority." 110 Cong. Rec. 7206 (1964). But "[n]one of these documents [was] read on the floor of the Senate, and there was no discussion of thei contents or of this specific seniority issue, then or thereafter." Cooper & Sobel, *Seniority and Testing Under Fair Employmen Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 Harv. L. Rev. 1598, 1610 (1969). Nearly eigh weeks later, on May 26, following a number of bipartisan leader-

ship conferences, the so-called Mansfield-Dirksen amendment was offered as a substitute for the entire bill. *See* Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 445-46 (1966). One of a number of amendments appearing for the first time was § 703(h).

The particular examples in these memoranda of Title VII's effect on seniority, *i.e.*, the references seized upon below to "established" and "existing" seniority, were not intended to be exclusive. Rather, they speak of the Act's effect on "existing" and "established" seniority only because that was the specific concern to which they were addressed.[19] It was well-established when Senator Clark introduced these memoranda that the National Labor Relations Act's policy of promoting collective bargaining "in respect to . . . conditions of employment"[20] was "broad enough to cover terms of seniority." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953). Given the issue to which the memoranda were responding and the common knowledge that seniority was a mandatory subject for collective bargaining,[21] it simply was not necessary for the memoranda specifically to address seniority systems instituted or revised post-Act. This is manifested by Senator Clark's remarks immediately after placing the Justice Department memorandum in the Record stating his overall conclusion that "it is clear that the bill would not affect seniority *at all*" and "would not affect the present operation of the

[19]Senator Clark prefaced his introduction of the Justice Department memorandum into the Record by stating (110 Cong. Rec. 7206 (1964)):

> I have also had prepared by the Department of Justice a summary statement in rebuttal to the argument made by the Senator from Alabama [Mr. Hill] to the effect that Title VII would undermine the vested rights of seniority.

[20]29 U.S.C. § 159(a).

[21]*See Industrial Union of Marine and Shipbuilding Workers of America* v. *NLRB*, 320 F.2d 615, 620 (3d Cir. 1963), *cert. denied*, 320 U.S. 984 (1964) ("seniority rights . . . are within the phrase 'wages, hours, and other terms and conditions of employment' and hence are mandatory bargaining subjects" (footnote omitted)); *NLRB* v. *Proof Co.*, 242 F.2d 560, 562 (7th Cir.), *cert. denied*, 355 U.S. 831 (1957) ("[n]or can it be doubted that seniority provisions . . . are among those 'conditions of employment' which the [NLRA] requires to be subjects of collective bargaining" (citations omitted)).

National Labor Relations Act or rights under existi
laws." 110 Cong. Rec. 7207 (1964) (emphasis added

As stated in *Franks*, Congress plainly designed § 7
a clarification or definitional provision of what is and
unlawful employment practice under § 703(a).[22] This
case, if Congress' concern in § 703(h) was to protect
Act seniority systems it would have required no feat c
tive drafting skill to insert the terms "existing" or "est
before the statute's descriptive phrase, "bona fide ser
merit system." Given the fact that the drafters of § 703
sumably had the Clark-Case and Justice Department me
before them, the absence of the terms "established," "
or any similar term of limitation in § 703(h) is an auth
indicator that the drafting groups, and the Congress as
did not intend any such limitation.

The unusual legislative drafting process that resulte
formulation of § 703(h) is entirely supportive of t
There is no evidence to indicate that the bipartisan le
drafting group's omission in § 703(h) of limiting term
"established" or "existing" was anything other than d
As the Court recognized in *Mohasco Corp.* v. *Silver*, 1
2486 (1980), Title VII as finally enacted was "care
ged," *id.* at 2493, by the bipartisan leadership of the S
sponsible for introducing, among other provisions, §
Legislative drafting at this highest congressional level,
larly "in light of the tempestuous legislative proceed
produced the Act," *id.*, was necessarily done with u
tention to detail and precise use of language.

In this regard, it is instructive to note that Senator
in presenting to the Senate the Mansfield-Dirksen am
including the newly-drafted § 703(h), stated after descr
bipartisan leadership drafting process (110 Cong. Re
(1964)):

As I look back now upon the time that has beer

[22]424 U.S. at 761.

> to the bill, I doubt very much whether in my whole l
> tive lifetime any measure has received so much meti
> attention. *We have tried to be mindful of every wo*
> *every comma, and of the shading of every phrase.*
> phasis added.)[23]

Considering these unique circumstances under which § 7
was drafted, no court should lightly read into the provi
limitation not employed by the Congress. Instead, it shou
gard the words used as sound indicia that the drafting
and the Congress did not intend to limit § 703(h).

Because the isolated references pulled from a mere p
the legislative history by the court below do not addre
specific issue in unambiguous terms, they wholly fail to
any clearly expressed legislative intention contrary to th
guage of the statute itself. *See Consumer Product Safety*
mission v. *GTE Sylvania, Inc.*, 100 S. Ct. at 2056.[24] Indee
talismanic quality conferred by the court of appeals on
limited legislative history pales in comparison to the num
expressions of Congress that the Act was not intended t
place or inhibit the national policy favoring seniority.

Concern for that policy was expressed right from the st
the consideration of the Act. In the dissenting Minority F
of the House Judiciary Committee, for example, the bil
criticized because it did not include a provision specifically
tecting the concept of seniority (H.R. Rep. No. 914, 88th C
1st Sess., 71 (1963)):

---

[23]*See also* 110 Cong. Rec. 12707 (1964) (remarks of Senator
phrey on the bipartisan leadership drafting group's concern with
sion of language).

[24]*See also United States* v. *Oregon*, 366 U.S. 643, 648 (1961) (i
statements in the legislative history "have never been regarded
ficiently compelling to justify deviation from the plain languag
statute"); *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945)
plain words and meaning of a statute cannot be overcome by a
tive history which, through strained processes of deduction from
of wholly ambiguous significance, may furnish dubious bases fo
ence in every direction").

> *Seniority is the base upon which uni*
> *Without its system of seniority, a union*
> *its greatest values to its members.*
>
> *The provisions of this act grant the*
> *union seniority.* The action of the Secre
> ready mentioned is merely the beginning,
> is adopted. With the full statutory powe
> bill, *the extent of actions which would b*
> *the seniority system is unknown and u*
> emphasis added.)

No distinction was drawn in this report bet
cruing before the Act and that which might c
subsequently. Thereafter, Congressman Celler,
House Judiciary Committee, responded to this
ing that the bill would not "destroy worker
(110 Cong. Rec. 1518 (1964)):

> It has been asserted also that the b
> *worker seniority systems* and employee r
> union and the employer. This again is
> *would do no more than prevent a union, a*
> *employers, from discriminating* against
> workers because of their race, religion, c
> (Emphasis added.)

As in the Minority Report, Congressman Ce
tinction between pre- and post-Act systems.

This concern with the national policy favor
tinued unabated as the bill, still without a s
proceeded to the Senate and was debated in th
filibuster. In a telling statement, Senator Hu
critics by assuring (110 Cong. Rec. 6549 (1

> This bill is *not an instrument to ab*
> unions themselves, as some have charged
> ard which the bill establishes for unions
> alike is that race will not be used as a ba

> tory treatment. *The full rights and privil*
> *membership, as protected by other Federal*
> *decisions, will in no way be impaired.* As
> friend of the American worker, I would n
> fair and reasonable equal employment opp
> sion *if it would have any harmful effect o*
> truth is that this title forbids discriminatin
> one on account of race. *This is the simple*
> *truth about Title VII.* (Emphasis added.)

In the same vein, Senator Kuchel remarked t
would seniority rights be affected by this act."
Neither Senator distinguished between seniority
Act and seniority post-dating the Act.

As this Court has emphasized (*United Steelwor*
443 U.S. at 206):

> Title VII could not have been enacted in
> substantial support from legislators in both H
> ditionally resisted federal regulation of pri
> Those legislators demanded as a price for the
> 'management prerogatives, and union freed
> left undisturbed to the greatest extent possi

Accordingly, the statutory words must be exam
ner that "reconstitute[s] [this] gamut of values
time when the words were uttered." *National Wo*
facturers Association v. *NLRB*, 386 U.S. 612,
(quoting L. Hand, J.). Instead of the unwarrante
as to Congress' intent made by the majority belc
references in only two documents, it is much m
conclude from the entire legislative history that C
mitted to "[t]he national policy favoring collectiv

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[25] *See also Texas Dep't of Community Affairs* v. *Bur*
1089, 1096 (1981) (Title VII "was not intended to
tional management prerogatives' ").

[26] *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 49
4349 (1981).

and seniority,[27] intended § 703(h) t
niority systems and revisions thereto,
Act. The system is protected, so long
the result of purposeful discriminatio

III.

The Holding Sought By Petitio
From Prior Decisions C

In addition to the plain language o
dictated by the full legislative history,
in several leading opinions that § 70
terpreted and is forward-looking in i
ensure that significant freedom is af
seniority systems. A decision reversin
expressly holding post-Act seniority sy
entitled to the protection of § 703(h)
ful discrimination would be fully con
these previous teachings.

In *Teamsters*, although not specific
sented here, the Court stated that "[s]
immunizes *all* bona fide seniority sys
guish between the perpetuation of p
nation." 431 U.S. at 348 n.30 (emp
the restrictive interpretation below, th
appreciated that Congress' concern i
not simply limited to seniority system
place at the Act's effective date (*id.*

> [T]here is no reason to suppose
> *1964* to extend less protection t
> seniority systems than to plantwi

[27]Seniority in the collective bargaining
our national labor policy," *Trans World A*
U.S. at 79, and "[s]ignificant freedom mu
unions to create differing seniority system
v. *Bryant*, 444 U.S. at 608.

> *as now* [1977], seniority was me
> ways, including length of time with
> ticular plant, in a department, in a
> gression . . . The legislative histor
> that any one system was preferre
> tations omitted.)

The Court recognized that no seniority s
is ever carved in stone. The essence of
unmistakable purpose of § 703(h) was
routine application of a bona fide senior
unlawful under Title VII." *Id.* at 352.[28]

Moreover, the *Teamsters* Court per
§ 703(h) was that seniority systems, b
by Congress, required a different mode
employment practices in ascertaining t
VII. This is because analysis of legal ef
quires proof of purposeful discriminatio
court of appeals to relegate post-Act sen
general disparate impact test laid down
rather than apply the *Teamsters* § 70
proof of purposeful discrimination, is an
discredited pre-*Teamsters* line of cases t
down seniority systems merely on the b
past discrimination, regardless of the
discriminatory motive. *See, e.g., Loca
makers & Paperworkers* v. *United Stat
Cir. 1969), *cert. denied,* 397 U.S. 919

[28]As stated in the plurality and dissenti
Brewers, "Title VII of the Civil Rights Act
practices, procedures, or tests that 'operate
of prior discriminatory employment practice
rule, § 703(h) of the Act . . . provides an exc
(Stewart, J.); "[t]he effect of § 703(h) is t
from the general prohibition on practices w
of racial discrimination" (*Id.* at 618) (Marsh

[29]Under the *Local 189* approach discredite
ployer and union could not demonstrate tha

(Footnote continued on following page)

In addition, the court
sters by seizing on the "r
giving it such a "stringent
Act change in a pre-Act s
§ 703(h) protection simpl
longer "routine." This rea
simply "stringent"; it is pl
plication" as it appears in *T*
ment that in its operation th
and ethnic groups." 431 U
change in a system prevent
after the change.

Important also is this C
extending the holding of *T*
lenge to a seniority system
criminatory *post*-Act event
a timely complaint.[30] The
1968, although perpetuated
system by rehire in 1972 w
did not constitute a contin
untimely charged event, th
alent of a discriminatory a
was passed." 431 U.S. at

Evans thus teaches that
Act in hiring and assigning
a seniority system after the
plaint as to those practice

(*Footnote continued from previo*

justified by "an overriding legi
that the particular seniority s
"safety and efficiency," then su
ination regardless of the prese
416 F.2d at 989, 994. *See als*
791, 799 (4th Cir.), *cert. dis*
by the majority in *Patterson I*
lines of progression, JA 79).

[30]*See California Brewers*, 4
holding).

under Title VII than an emplo
in place on the effective date of
be equally applicable to the ac
as to the pre-Act system. Othe
an employer is entitled "to treat
spondent failed to file a [timely
at 558, is stripped of meaning
relegated to a perpetuation con
and disparate impact, regardless
discriminate.[31]

In *Evans*, the Court squarely r
nounced below that § 703(h)
practices (431 U.S. at 560):

> The Court of Appeals re
> an attack on a seniority sy
> of discriminatory acts whi
> tive date of Title VII in 1
> *to such attacks based on*
> *reading of § 703(h) is too*
> foreclose attacks on the cu
> tems which are subject to c
> *such a challenge to a neutr*
> *on the mere fact that a p*
> *legal significance has affec*
> *credit*, even if the past eve
> tified a valid claim against
> would substitute a claim
> every claim which is barre
> *would contravene the ma*
> added; footnote omitted.)

[31]To the extent liability was impo
perpetuation of the effects of a disc
changes, *Evans* makes clear that s
basis of challenging the seniority sy
cause such act had not been made the
the 90-day rule then applicable (*see* r
260, 42 U.S.C. § 2000e-5(d) (curren
(180-day rule)).

By construing § 70
n.4) of no applicab
of appeals below c
proach to § 703(h
Evans.

Equally support
practices should be
Airlines, Inc. v. *H*
ferentiating betwee
niority systems are
itself." 432 U.S.
stated by the Fourt
would apply to po
stead, *Hardison* co
and *Evans* (432 U.

> Absent a disc
> *ity system* ca
> *even if the sy*
> . . . .
> . . . § 703(
> *statutory viola*
> *natory purpos*
> U.S. 553, 558

The expansive i
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clear that the term
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> *establish con*
> *ticular busine*
> behoove a co
> products. Seni

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citations omitted.

Because seniority syst
shapes," *id.*, the defini
tem" in § 703(h) wa
looking, and not static.
stated, "must be afford
ing seniority systems."
would be illusory if an
tiated after the Act wa
to bona fides analysis u

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[32]Not one circuit has a
niority systems instituted
ysis. Two circuits have
sence of bona fides and
International Ass'n of Bri
Cir. 1980), the Eighth
initiated post-Act in a
be judged" under *Teamst*
seniority systems which h
other minorities, provided
tional discrimination." *Id.*
Hameed court properly ap
1972 referral seniority sy
is critical." *Id.* Contrary
Eighth Circuit correctly ob
had been shown, the seni
be a prima facie violation
nizes seniority systems fro
theories of *Griggs*." *Id.* at
735, 565 F.2d 1364 (6th C
the Sixth Circuit drew no
pre- and post-Act seniority
bona fides test.

Moreover, numerous di
viewed post-Act seniority
proof of discriminatory i
seniority system as a pren
e.g., *Johnson* v. *Burroughs*
Fla. 1980) (seniority syste

(Footnote continued on follo

In sum
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IV.

Unless Corrected, The Rule Announced Below Will Have A Chilling Effect On Labor Relations And Affirmative Action

Under the rule announced below, any new seniority system, or a post-Act revision to a pre-Act system, proposed in collective bargaining would have to withstand the difficult *Griggs* disparate impact analysis with its primary reliance on statistics[33] and its related burden of establishing a business necessity defense.[34] Management and labor would first have to be sure that the racial and sexual breakdown within departments, lines of progression or other seniority units mirrored the relevant statistics before the seniority practice could be implemented. Absence of discriminatory intent would be meaningless. Mere statistical disparity would defeat the proposal and a numbers game would become the substitute for the "[s]ignificant freedom [which] must be afforded employers and unions to *create* differing seniority systems." *California Brewers*, 444 U.S. at 608 (emphasis added).[35] The critical elements of national labor pol-

[33]Plaintiff in a case alleging disparate impact invariably establishes a *prima facie* case through a statistical showing of imbalance. *See, e.g., United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). The district court *sub judice* accepted this procedure (*see* n.3, *supra*).

[34]Lower courts have held defendants to exacting standards under the business necessity test, *see United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971) and pre-*Teamsters* courts rarely upheld a seniority system pursuant to claims of business necessity. *See, e.g., United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 451 (5th Cir. 1971), *cert. denied sub nom., Brotherhood of Locomotive Engineers* v. *United States*, 406 U.S. 906 (1972) (" '[t]o be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals,' " quoting *United States* v. *Bethlehem Steel Corp.*, 446 F.2d at 662). In the case at bar, the district court imposed the business necessity test (JA 9, 28, 32), as did the court of appeals (JA 79-80).

[35]Such a result would be contrary to the essence of collective bargaining, which is that "it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static." *Aeronautical Indus. Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 525 (1949).

icy recognizing "the give and take of free collective bargainii [and] the specific characteristics of a particular business or i dustry," *id.*, would thus be substantially impaired.

These results would follow notwithstanding that a key aspe of national labor policy, reflected in statutes governing relatio ships between employers and unions,[36] "encourages the neg tiation of terms and conditions of employment through the co lective-bargaining process." *Barrentine* v. *Arkansas-Best Freig System, Inc.*, 49 U.S.L.W. 4347, 4349 (1981); *see also En porium Capwell Co.* v. *Western Addition Community Organiz tion*, 420 U.S. 50, 62 (1975) (recognizing the national lab policy "encouraging the practice and procedure of collective ba gaining"). That collective bargaining process invariably includ negotiation of seniority provisions, as "[s]eniority has become overriding importance, and one of its major functions is to d termine who gets or who keeps an available job." *Humphrey* v *Moore*, 375 U.S. 335, 346-47 (1964); *see also Franks*, 42 U.S. at 766.[37]

As the Minority Report of the House Judiciary Committe recognized, seniority is "the base upon which unionism founded." H.R. Rep. No. 914, 88th Cong., 1st Sess., 71 (1963) But seniority is not simply of overriding importance to unio and employees alone. Employers also have a vital interest i seniority and in re-shaping seniority systems on an on-goin basis to maximize efficiency and minimize costs of productio (U.S. Dep't of Labor, Bulletin 908-11, *Collective Bargainin Provisions*—Seniority, 14 (1949)):

> Management customarily prefers narrower seniority unit preferably by job classification or department, in order

[36] *E.g.*, the National Labor Relations Act of 1935, 29 U.S.C. § 15 *et seq.*; the Labor Management Relations Act of 1947, 29 U.S.C. § 14 *et seq.*

[37] In *Franks* the Court noted that "[s]eniority systems and the entitl ments conferred by credits earned thereunder are of vast *and increasin importance* in the economic employment system of this Nation," 42 U.S. at 766 (emphasis added), citing to S. Slichter, J. Healy, & E. Liver ash, *The Impact of Collective Bargaining on Management*, 104-11 (1960).

> *establish competition between the same skills, to prevent excessive displacement of workers and numerous transfers* from one department to another, *and to eliminate high training costs.* The types of seniority incorporated in agreements probably reflect attempts to reconcile the view that the wider unit gives the greatest protection with the belief that *some kind of limitation on departmental, occupational, or geographic lines is necessary for productive efficiency.* (Emphasis added.)[38]

There are myriad legitimate reasons, then, why new or revised seniority systems may be proposed at the bargaining table. There are equally as many legitimate considerations that shape the end result, including the different perspectives of management and labor, their relative bargaining strengths and the number and relative importance of other matters that are up for consideration at the same time.[39] Absent significant freedom to bargain over such issues, the give and take essential to the collective bargaining process is curtailed.

Congress, in adopting Title VII, was certainly aware of the national labor policy encouraging such free collective bargaining and recognizing the importance, diversity and changing nature of seniority practices. The decision below turns this critical policy on its head by commanding application of a harsher legal standard to post-Act seniority systems and revisions.[40] If

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[38]*See also* Slichter, et al., *supra* at 181, wherein Professor Slichter observed in 1960: "Although management once felt that promotion decisions were one of its most important prerogatives, it is now coming to realize that proper use of the seniority criterion in these decisions is not necessarily incompatible with efficiency and employee morale."

[39]As this Court recognized as long ago as 1949, "[t]here are great variations in the use of the seniority principle through collective bargaining." *Aeronautical Indus. Dist. Lodge 727* v. *Campbell,* 337 U.S. at 526.

[40]Should the result below prevail, the fear of the dissenting Minority Report of the House Judiciary Committee that Title VII would *"grant the power to destroy union seniority"* would surface and "[s]eniority [as] the base upon which unionism is founded" would be undermined. H.R. Rep. No. 914, 88th Cong., 1st Sess., 71 (1963) (emphasis in original).

adopted here, it would deny the fact that seniority "assume an almost infinite variety" and must con adopted and altered "to meet changing or unforeseen s Aaron, *Reflections On The Legal Nature And Enforc Seniority Rights,* 75 Harv. L. Rev. 1532, 1534 (19

Furthermore, the inevitable result of the pre-Act dichotomy in the applicable analyses under § 703(h) w an unfortunate, damaging effect on affirmative action jority below held § 703(h) inapplicable to all post-A ity system "change[s] and formalization[s] (*whether i or against employee interests*)" (JA 143 n.4; emphasi As a consequence, good-faith changes in pre-Act sen tems made after the effective date of Title VII, even th benefit persons covered by the Act, will be discourage such a change would consign the system to a *Grigg* and make valueless a laudatory intent to lessen or elim criminatory effects. Pre-Act systems will be retained u in order to preserve § 703(h) protection and its bona f ysis pursuant to *Teamsters.*

Such a result would be contrary to this Court's ob in *Franks* that (424 U.S. at 779):

> the ability of the union and employer voluntarily the seniority system to the end of ameliorating t of past racial discrimination, a national policy of the 'highest priority,' is certainly no less than areas of public policy interests. *Pellicer* v. *Broth Ry. & S.S. Clerks,* 217 F.2d 205 (CA5 1954), ce 349 U.S. 912 (1955). See also Cooper & Sobol, L. Rev., at 1605.

A decision affording § 703(h) protection to post-Act systems and revisions thereto provided they are not n an intent to discriminate would provide an incentiv ployers and unions to modify seniority practices for th

of furthering the important national interest in eliminating criminatory effects in the workplace.[41]

Until the decision below, *Teamsters* and *Evans* could be ically read to provide employers and unions with this pow incentive today to consciously adopt or revise seniority p tices in an effort to ameliorate any effects of past discrimina be they pre-Act or post-Act effects, without fear of losing statutory protection of § 703(h). A rule stripping any post seniority modification of this statutory protection and releg good faith seniority changes to the burdensome analysi *Griggs* will discourage such attempts to broaden employmen portunities.

This unfortunate effect of the court of appeals' rule was rectly pointed out by the dissenters, who noted that even a p Act change made "in favor of a class of black employees, deprive the company and the union making the change from benefit of a § 703(h) exemption" (JA 183). Such prohib effect of the majority's ruling runs directly contrary to Court's observation in *United Steelworkers* v. *Weber*, U.S. at 204 (citing *Albemarle Paper Co.* v. *Moody*, U.S. at 418 (1975)), that Title VII is "intended as a spu catalyst to cause 'employers and unions to self-examine an self-evaluate their employment practices and to endeavo

---

[41] *See United States* v. *City of Miami, Fla.*, 614 F.2d 1322, (5th Cir. 1980):

> To say that a seniority system is immunized from attack n that the employer cannot be forced against its will to modif system, not that the employer cannot agree to change it.
>
> . . . Just as a collective bargaining agreement may, for the pose of furthering public policy interests beyond what is req by statute, enhance the seniority status of certain employees though to some extent this will be detrimental to the expecta of other employees [citing *Franks*], so may an employer volun consent to changes in seniority provisions that do not abridge tractual, statutory or constitutional rights of its employees or bargaining agent to further important public policy interests.

eliminate, so far as possible, the last vestige
and ignominious page in this country's histo

The restrictive principle announced bel
tive bargaining in the important area of s
management and labor from adopting empl
meet a changing economy or industry. It je
of diverse seniority systems established or r
industry in the sixteen years since Title VII's
a significant damper on good faith efforts m
affirmative action to overcome vestiges of p
It must be rejected.

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[42]The dissent recognized this conflict with *Webe*

> That part of the majority opinion providing
> a union cannot alter a seniority system so as
> able the conditions of employment of minority
> contrary to *Weber*, I think. It requires a too
> of the statute to hold that a seniority system
> natory in effect, as in *Teamsters*, is protected
> as it remains unchanged, but if it is changed i
> ity employees, then the employer and the unio
> exemption.
>
> . . . Such a conclusion, I suggest may s
> that is precisely what the majority holds.

CONCLUSION

For these reasons, the decision of the court of a
be reversed and the case should be remanded for
tion whether the lines of progression are bona fide
(h) and not the result of an intention to discrimina

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